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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 18

THAD BENSON CARTER,

Petitioner,

vs.

GEORGE A. KUBLER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CERTIORARI GRANTED APRIL 5, 1943

BRIEF
ON BEHALF OF THE PETITIONER

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NOTE: All emphasis in this brief is supplied except where it is otherwise stated.

The Question Before This Court.

The issue in this case arises out of that portion of Chapter VIII of the Bankruptcy Act, entitled "Provisions

for the Relief of Debtors" known as the farmer debtor law. Section 75. 11 U. S. C. 203. The particular part of the section involved is Section 75(s)(3) relating to the farmer debtor's right to redeem his farm within three years from the issuance of a stay order under Section 75(s)(2).

Section 75(s)(2) provides for the issuance of a stay of all proceedings against the farmer debtor and his property for three years, following certain preliminaries including an appraisal of his property at its "then fair and reasonable market value."

Section 75(s)(3), in its applicable portion, then reads as follows:

> "At the end of three years, or prior thereto, the debtor may pay into court **the amount of the appraisal of the property**. . . . Provided that upon request . . . the court **shall** cause a reappraisal of the debtor's property, or in its discretion set a date for **hearing** and after **such hearing,** fix the value of the property **in accordance with the evidence** submitted, and the debtor shall then pay the value so arrived at into court . . . and thereupon the court shall by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor" . . . .

In granting certiorari, at 318 U. S. 753, this court limited the issue to "the first question presented by the petitioner".

That question, submitted by the petitioner at page 3 of his petition for certiorari is this:

> In fixing the valuation at which a farmer debtor shall redeem his farm does the statutory provision in Section 75 (s) (3) [11 USC 203(s)(3)] that the court **shall** "set a date for **hearing,** and after **such hearing,** fix the value of the property, **in accordance with the evidence submitted**" permit a conciliation commissioner to fix

such valuation "upon a **personal investigation by the conciliation commissioner**" in addition to the evidence submitted to him at a hearing? R. 9, next to the last paragraph.

This brief is limited to that question.

A letter from the clerk to counsel, dated April 5, 1943, contained the additional statement that "counsel are requested to discuss in their briefs and on the oral argument the question whether the error, if any, was cured by the District Court's review".

OPINIONS BELOW

In the District Court

The opinion of the District Court has not been published. It appears in the record at R. 35 to 37.

In the Circuit Court of Appeals.

No opinion was rendered in the Circuit Court of Appeals. The final order, reported at 131 Fed. (2d) 222, appears in the record at R. 37 to 38.

STATEMENT OF THE CASE.

At the beginning of the three year stay under Section 75(s) the conciliation commissioner approved the appraisement of the farm by three appraisers at $5800. Statement of the conciliation commissioner: R. 26, bottom of page to R. 27, top of page. Statement of two appraisers: R. 39 to 41. This original $5800 appraisement was required by Section 75 (s), first unnumbered paragraph, and was **the value at which the redemption was to be made** by the

farmer debtor unless, after the lapse of time, the farmer debtor or a creditor should seek a reappraisement, pursuant to Section 75(s)(3).

At the end of the three year stay an order of sale was issued. However, when this court in *Wright* v. *Union Central*, 1940, 311 U. S. 273, decided there may be no sale under Section 75(s)(3) until the farmer debtor has had an opportunity to redeem, the order of sale was revoked and the conciliation commissioner was directed to determine by a hearing the value of the farm pursuant to Section 75(s)(3). R. 8 to 9.

Evidence was taken by the conciliation commissioner. R. 10 to 28. He reported to the judge that "after hearing the testimony given by the several witnesses, and studying the briefs furnished by the defendant and the plaintiff, and **upon a pefsonal investigation by the conciliation commissioner** of the value of said farm I hereby fix the value of said farm at $150 per acre". ($25,200). R. 9. This sum was practically **four and one-third times the original $5800 appraisement** by the three appraisers which had been approved by him.

The farmer debtor filed a petition for review by the district judge in which he made specific objections to the "personal investigation by the conciliation commissioner" outside of the evidence submitted to him. These objections were made in "Specification of Errors" numbered 5, 6, 7, and 8, in the petition for review. R. 31.

Upon review the judge issued his memorandum opinion reducing the valuation to $20,000, which was nearly three and one-half times the original appraisal. R. 35. Referring to the former appraisal before the conciliation commissioner of the fair and reasonable market value of the farm at $5800 the judge's opinion stated: "However, that value the commissioner stated was made **for taxation purposes.**" R. 35, bottom of page. There is **no such statement in the record.** The statement of the conciliation com-

missioner concerning the original $5800 appraisal: R. 26, bottom of page to R. 27, top of page.

The farmer debtor filed an application for rehearing, which was denied, setting forth the affidavits of two of the three appraisers, stating that originally in the same proceeding they had appraised the farm at $5800 and that they considered that sum to be the then **fair and reasonable market value**; and further stating that the same conciliation commissioner at the time when the appraisal was reported to him said that "$5800 was no more than the farm was worth and he expressed his agreement with the appraisers in fixing the appraisement of said farm at $5800." R. 39 to 41.

The petitioner's "Statement of Points" numbered 4 and 5 in his appeal to the Court of Appeals asserted that the District Court erred in basing its final order upon the statement that the original appraisal of $5800 was for taxation purposes and upon the conciliation commissioner's order of reappraisement based upon a personal investigation by the conciliation commissioner made outside of the hearings and without any opportunity being afforded to offer counter evidence or to cross examine concerning it. R. 43.

The appellate court without any opinion affirmed the district court in an order stating "there was no abuse of judicial discretion in the finding that the reasonable market value of the farm land in question was $20,000." R. 45.

SPECIFICATION OF ERRORS.

1.

The bankruptcy court based the valuation for redemption upon a personal investigation made by the conciliation

commissioner wholly outside of the evidence submitted at a hearing held by the conciliation commissioner to determine such valuation.

2.

It defeated the farmer debtor's statutory right of redemption by fixing a valuation contrary to the evidence submitted at a hearing.

3.

It fixed a valuation for redemption at a price grossly in excess of the official valuation previously found by the court in the same proceeding, there being no evidence of any such increase in value.

4.

It considered the amount of liens against the farm in fixing its valuation for the purpose of redemption from such liens.

5.

The appellate court held that a bankruptcy court may exercise a judicial discretion in fixing the value of a farm for redemption under the provisions of such law. The statute prescribes that the valuation shall be set at its fair and reasonable market value as disclosed by the evidence submitted at a hearing held for the purpose of determining such value.

6.

The bankruptcy court sustained an excessive valuation of the farmer debtor's farm for redemption by a conciliation commissioner by finding that the conciliation commissioner's former official valuation in the same proceeding was made for taxation purposes whereas there was no evidence to support such statement.

Summary of the Argument.

The question presented concerns the very heart and center of the farmer debtor law. The redemption provisions of Section 75 are the culmination of the Act. Every other provision of the act is subsidiary to it. The methods employed here defeat the entire purpose of the law.

The statute definitely lays down the method of valuation. This court has repeatedly held that Section 75 prescribes an orderly procedure which is a mandate that must be obeyed. The bankruptcy court violated the statute by preventing redemption. It did it through the device of increasing the valuation up to the neighborhood of the liens and hiding the discrepancy between evidence and conclusion under the guise of "personal investigation", and totally disregarding its own original valuation.

An examination of the evidence demonstrates the unlawful theory under which the mortgage holders pressed upon the conciliation commissioner an inflated fictitious valuation made to measure up to the mortgage liens.

The error complained of was not cured by the District Court's review. The original official appraisement of $5800 in the same proceeding under Section 75(s), first unnumbered paragraph, was wholly disregarded. Contrary to the clear and undisputed evidence the District Court found that the original $5800 appraisal in the same proceeding before the conciliation commissioner was for "taxation purposes".

The error committed by the conciliation commissioner in making his "personal investigation" wholly outside of the hearing conducted before him was not considered by the District Court on review.

Since the judge upon review did not reject the extra judicial "personal investigation" by the conciliation com-

missioner, and in addition totally misconstrued the record concerning the conciliation commissioner's original appraisal at $5800 and merely reduced the conciliation commissioner's valuation from four and one-third to nearly three and one-half times his original valuation, the error was not cured.

The Circuit Court of Appeals, in holding that there was no abuse of "**discretion**" in the finding of value by the bankruptcy court totally misconstrued that portion of Section 75(s)(3) which provides that "the court shall cause a reappraisal of the debtor's property, or in its **discretion** set a date for hearing, **and after such hearing, fix the value of the property in accordance with the evidence submitted**". The court has no discretion to disregard the clear statutory provision that it shall fix the value **at a hearing in accordance with the evidence submitted.**

ARGUMENT.

This Case Involves the Whole Purpose of the Farmer Debtor Law.

The **purpose** of the farmer debtor law, like that of the other "Provisions for the Relief of Debtors" (Heading of Chapter VIII) in the Bankruptcy Act relating to railroads, corporations and municipalities, **is to keep the owner debtor in permanent possession of the mortgaged property.** This is to be accomplished by paying to the mortgagee **the value of the security** instead of permitting him to take the security itself. As this court has declared, "There is no constitutional claim of the creditor to more than that." *Wright* v. *Union Central*, 1940, 311 U. S. 273, 278. If the valuation is inflated beyond the value, the mortgagee takes the property and the purpose of the law is defeated.

In the same decision this court also declared, and repeated the declaration in another decision, that "the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress . . . lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act." *Wright* v. *Union Central*, 1940, 311 U. S. 273, 279. *Wright* v. *Logan*, 1942, 315 U. S. 139, 140.

The administrative machinery prescribed by Section 75 and repeatedly held by this court to be an orderly procedure which is a mandate of the statute is designed to accomplish redemption and it is very explicit. It is embodied in Section 75(s)(3) where it is provided that the

farmer debtor may pay into court the value of his mortgaged property. The mortgaged property is then free from all liens and the farmer debtor receives his discharge.

If this legal machinery is misused the whole statute is defeated and all the antecedent procedure has been in vain. Of the redemption provisions those pertaining to fixing the valuation of the security are their core and center. If a fictitious inflated valuation is set, there can be no redemption and, as Lincoln said, "the law is cheated."

The statutory method set up in Section 75 and the method employed by the bankruptcy court in this case are therefore first presented.

The Mandate of the Statute Governing Valuation and the Method Employed.

The Statutory Method.

"Such appraisers shall appraise all of the property of the debtor . . . at its then **fair and reasonable market value.**" Section 75(s), first (unnumbered) paragraph.

"Upon request . . . the court **shall** cause a reappraisal . . . or in its discretion **set a date for hearing and after such hearing, fix the value of the property, in accordance with the evidence submitted.**" Section 75(s)(3).

The Method Employed.

The conciliation commissioner's increase of the farm valuation from his original official appraisal of $5800 to $25,200 (four and one-third times the original appraisal) **was not determined by the evidence submitted.** It was undoubtedly influenced by the fact that the first mortgage amounted to $34,702 and the second mortgage amounted

to $2000 more. R. 26, last full paragraph. R. 27, bottom of page.

Neither the conciliation commissioner, the judge, nor the appellate court justified the increase on the basis of the evidence submitted at the hearing. The following quotations prove this statement:

The **conciliation commissioner** said (after stating that he heard the evidence and studied the briefs of the parties): "**and upon a personal investigation** by the conciliation commissioner of the value of said farm, I hereby fix the value of said farm at $150 per acre" (168 acres at $150, $25,200). R. 9, bottom of page.

The **judge** upon review said nothing about the extra judicial "personal examination" by the conciliation commissioner but went further in committing error when, referring to the original $5800 appraisal by the conciliation commissioner in the same proceeding, he said: "However, **that value** the commissioner stated, **was made for taxation purposes.**" R. 35, bottom of page. **This statement is not supported by any evidence;** the conciliation commissioner stated that "**the former appraisement of Carter's farm in these proceedings was $5800**". R. 26, bottom of page to top of page 27. No appraisal for taxation is provided or mentioned in Section 75.

The **judge** also stated: "it does seem to me the appraisal is high." R. 36, middle of page. "The buildings and fences are probably of little value for appraisal purposes and the timber land probably the same." R. 36, middle of page. "The testimony gives the impression that there is not an active market for farm land in this location." R. 36, bottom of page. "It is seriously doubted that such a market value [for a country place] ever will exist and

it must be regarded as merely speculative." R. 37, top of page.

The **appellate court** merely said: "there was no abuse of judicial discretion." R. 45.

Neither the conciliation commissioner, the judge of the district court nor the appellate court discussed the actual testimony. It will be discussed later in this brief.

Devices Employed to Defeat the Law.

This court has at least five times stated the purpose of the law very clearly and protected it. In *Wright* v. *Union Central*, 1940, 311 U. S. 273, at page 279 it was said:

> "This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt. . . . Safeguards were provided to protect the rights of secured creditors throughout the proceedings, to the extent of the **value of the property.** . . . There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."

The opinion cited four other decisions of this court in support of the statement just quoted: *Wright* v. *Union Central*, 1938, 304 U. S. 502; *John Hancock* v. *Bartels*, 1939, 308

U. S. 180; *Kalb* v. *Feuerstein*, 1940, 308 U. S. 433; *Borchard* v. *California Bank*, 1940, 310 U. S. 311.

In the never-ending contest by which mortgage holders seek to circumvent the repeated decisions of this court, there were employed in this instance three devices.

First Device, an Inflated Valuation, the Device in Issue Here, Prevents Redemption.

The price of redemption in Section 75 is the **"amount of the appraisal"** (Section 75(s)(3)) and the standard of the appraisal is the **"fair and reasonable market value"** (Section 75(s) first and unnumbered paragraph), **which the court shall "fix" . . . "in accordance with the evidence submitted."** Section 75(s)(3).

One device employed in the instant case was to set the revaluation near the amount of liens without regard to value. An attempt was then made to smother out objections that the evidence submitted does not support that valuation of four and one-third times the original by a statement that **the evidence submitted was supplemented by the "personal investigation" of the conciliation commissioner.** R. 9. He knew that in the same proceeding the appraisal made by his appraisers was $5800 which he had approved without objection or appeal. R. 26, bottom of page and R. 27, top of page. Affidavits of appraisers at R. 39 and 40. Clerk's docket entries R. 4 to 8, passim. He knew that **the evidence submitted** did not support a raise of four and one-third times $5800 to $25,200, therefore he strove to make it clear that **in addition to the evidence submitted he had made his "personal investigation" which could not be cross examined or analyzed on review.**

Second Device, an Inadequate Time to Redeem.

Although not in issue here, because the court has limited the question to the single one stated at the beginning of this brief, nevertheless it is pertinent to show that the first device was supplemented by other devices in pursuance of a general plan. For example another device inimical to redemption was making the payment of the redemption money due within a period too short for redemption. The conciliation commissioner's order effective August 16 required redemption by October 15. It was filed August 6, and by Rule 62, and 28 U. S. C. 874, became effective in ten days. R. 9. It is not to be supposed that any farmer debtor, so seriously involved as to invoke Section 75, can within three years earn enough cash to redeem his farm. A real estate loan can not be applied for until it is known exactly how much is needed and when. An abstract, including the farmer debtor proceeding, must be completed, examined, and the objections to it met. Finally the title must be approved by the lender. These steps would ordinarily require about six months. The Judge allowed but 18 days and from the denial of the petition for rehearing it was but 6 days. R. 37 and 38. R. 41.

Third Device, Farming Operations Prohibited.

Another supplemental device was the order prohibiting "any planting of any description until after October 15, 1941". R. 9, and top of page 10. This device of interfering with the operation of the farm as a going concern was likewise inimical to the obtaining of a loan.

We now proceed to examine the evidence.

THE EVIDENCE.

Some Extrajudicial Procedure in Violation of Orderly Procedure of the Statute.

This extraordinary type of procedure by **"personal investigation"** is evidence that the conciliation commissioner well knew that the evidence submitted at his hearing did not warrant such a fantastic increased valuation. By introducing an unknown and mysterious factor—his "personal investigation"—an attempt was made to knock the props out from any objection that the evidence submitted does not support the newly increased valuation of $25,200. This gross violation of orderly procedure made the valuation proceeding a nullity by violating a fundamental principle of American jurisprudence—due process of law.

The Method Has Already Been Condemned.

The general method employed here is universally condemned in any judicial proceeding. An example is the sharp criticism expressed by the Supreme Court of Ohio in: *Railroad* v. *Bolen*, 1907, 76 Ohio State 376, at page 385, concerning a view of real estate:

> "If the testimony is to be taken in part out of court, and as to that part in utter silence, how can the parties cross examine? How can they offer rebutting testimony? How can the counsel intelligently argue the questions of fact? In short, how is it possible to have a fair trial?"

This court said of the right of cross examination in: *Ottawa* v. *Stewart*, 1866, 70 U. S. (3 Wall.) 269:

> "the right is a valuable one as a means separating hearsay from knowledge; error from truth; opinion from fact, and inference from recollection."

In *Interstate Commerce Commission* v. *Louisville*, 1913, 227 U. S. 88, it was held that even a *quasi* judicial commission may not go outside the record in concluding an issue because only when evidence is put in the record can a party have an opportunity to "test, explain, or refute" and to "cross examine witnesses and inspect documents and offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense."

Akron v. *United States* (New England Division case), 1923, 261 U. S. 184, held the same.

In *United States* v. *Abilene*, 1924, 265 U. S. 234, this court again applied the rule saying that "nothing can be treated as evidence which is not introduced as such."

In *Crowell* v. *Benson*, 1932, 285 U. S. 22, it was said that "Facts conceivably known to the deputy commissioner but not put in evidence so as to permit scrutiny and contest will not support a compensation order. . . . An award not supported by evidence in the record is not in accord with law."

It requires but a little contemplation of the "personal investigation" method to disclose its viciousness. Did the conciliation commissioner go alone? Or was he accompanied by other parties, interested or disinterested? Did he view the right property? Possibly he misread the T4S R6E for T6S R4E and saw a different property miles away. Did he know where the lines of the property run? Possibly he considered that a building which he thought was on the property was worth $10,000 whereas it was on another property. The victim of such a "personal investigation" is deprived of any opportunity to correct possible errors.

The method pursued here has been condemned in a farmer debtor proceeding. While this procedure was going on in Ohio another like it occurred in California where the conciliation commissioner also proceeded to fix the valuation for redemption under Section 75(s)(3) by his "personal investigation" in addition to the evidence submitted. There also the judge affirmed the conciliation commissioner.

We quote from the opinion of the Circuit Court of Appeals for the Ninth Circuit which reversed the conciliation commissioner and the district judge and annulled the valuation, because the "orderly procedure" of the statute was not followed:

Moser v. *Mortgage Guarantee Company*, CCA 9, 1941, 123 Fed. (2d) 423:

The conciliation commissioner's report read in part as follows:

> "'After hearing all parties in interest and their appraisers and *after making a personal visit to the ranch and looking the property over and I talked to other property owners in the vicinity*, I came to the conclusion that the property was worth Twelve Thousand Dollars ($12,000) and that is my finding and I accordingly fixed the value at the same amount.'" The italic emphasis is that of the appellate court.

In its opinion the appellate court said that "the commissioner misconceived the **plain direction of the statute**", citing *John Hancock* v. *Bartels*, 1939, 308 U. S. 180, and *Borchard* v. *California Bank*, 1940, 310 U. S. 311.

The opinion of the appellate court further said:

> "In providing for the hearing the statute prescribes that the commissioner shall 'set a date for the hear-

ing and **after such hearing, fix the value of the property in accordance with the evidence submitted.** . . .' But the commissioner did not abide by his opening statement nor by this requirement of the statute, for **after the hearing he personally proceeded as would an appraiser preparing for a hearing, to gather his own facts and to consider his own impressions therefrom** together with the 'evidence submitted.' (No evidence taken outside the hearing is included in the transcript certified to the judge.) **The Act does not recognize the conciliation commissioner as a qualified appraiser nor authorize him to act in such capacity and does not authorize him to supplement the 'evidence submitted' with investigations and evidence taking of his own outside the hearing and without the knowledge of the parties to the hearing.** In short, the commissioner departed from the statute in a very material and prejudicial manner.

The presentation in person or by deposition of witnesses whose testimony is to be considered, and a reasonable opportunity for cross examination, is implicit in all formal hearings such as the one under consideration. Neither of these requisites of our jurisprudence was afforded in this instance."

"What influence the evidence taken outside the hearing, proper or improper, may have had upon the conclusion reached by the commissioner, or what counter effect cross-examination or rebuttal testimony would have had upon such conclusion, can never be known.

The order appealed from is reversed, annulled and set aside."

This method of reaching judicial conclusions has likewise been recently condemned in the following decision in the Third Circuit in a regular bankruptcy proceeding:

In re Aughenbaugh, 1942, CCA 3, 125 Fed. (2d) 887. There the referee in bankruptcy considered papers in the file not introduced in evidence at the hearing. The Appellate court held that such method violated due process of law because the parties to the hearing had no opportunity to explain or refute the outside evidence. It held that in determining an issue the court must consider solely the evidence presented.

Likewise the Ninth Circuit in *Corey* v. *Blake*, 1943, CCA 9, 136 Fed. (2) 162, has very recently reversed a conciliation commissioner and a judge because they failed to observe "orderly procedure" in the administration of the appraisal provisions in Section 75(s). The court said:

> "The question is whether the orderly procedure which subsection (s) is designed to provide was followed in this case," citing the *Bartels* and *Borchard* decision of this court.

An order of sale was granted by the conciliation commissioner and sustained by the judge for alleged disobedience to rental order following an appraisal. The conciliation commissioner had ordered rental to be paid but the appellate court held that it was not an order "made pursuant to this section" [Section 75(s)(2)] because the record failed to show appointment of appraisers. The record did show the following:

> (1) A report signed by three men who styled themselves "appraisers appointed by the court" etc. "in the above entitled matter".
>
> (2) This report was endorsed "Approved and accepted by stipulation of parties & counsel".
>
> (3) An entry of the same date in the record book of the conciliation commissioner recited: "Mr. Cragin [an 'appraiser'] examined on appraisal . . . appraisal stipulated to by counsel".
>
> (4) The conciliation commissioner in a subsequent

order stated that on the same date, pursuant to notice to creditors a meeting was held for the purpose of considering an appraisal and that he presented "the official appraisal" and the parties "stipulated that the appraisal returned by the official appraisers appointed by this court be and is the value of the property, and the court thereupon approved and adopted said appraisal".

The appellate court held that the "approval" of the appraisal, not having been appealed, could not be reviewed. "But", said the court "although we may not review that approval, we may consider its effect, if any. We think it had no effect whatever;". It held that the provision in Section 75(s) that "the referee . . . shall designate and appoint appraisers" was never complied with. There having been no order appointing appraisers there was no appraisal, and consequently no valid rental order could be made. The court concluded that no "orders of the court made pursuant to this section" 75(s) had been disobeyed. "Thus," the opinion continued, "instead of following the orderly procedure which the statute was designed to provide the Commissioner followed a disorderly and unauthorized procedure" citing the *Bartels* and *Borchard* decisions of this court.

We state unequivocally that the figure of $25,200 was not arrived at by a judicial determination in compliance with the "orderly procedure" of the statute. An examination of the evidence demonstrates it.

The Mortgage Holders' Standard of Valuation.

It is clear from the evidence submitted by the mortgage holder that the court was expected to fix the value of the farm for redemption with some relation to the amount of the mortgage.

At R. 27, he put in his mortgage debt as $34,702.

The witnesses put on by him gave evidence of the value at figures approximate to the amount of the mortgage. They were:

Chamberlain, $33,600. R. 11 ($200 per acre).

Scanlon, exactly the same $33,600. R. 11 ($200 per acre).

Osborn, $31,290 to $33,600. R. 12 ($190 to $200 per acre).

Huddilston (after hearing the farmer debtor's witnesses at R. 12 to R. 22) dropped to $29,400. R. 23 ($175 per acre).

Cochran, the second mortgage holder (R. 26, bottom of page) who can get nothing until the first mortgage is satisfied, topped them all, and went up to $37,800. R. 26 ($225 per acre).

This analysis of the evidence explains the peculiar gyrations of the testimony of respondent's witnesses. Though *Wright* v. *Union Central*, 1940, 311 U. S. 273, was expected to restore the right of redemption to all farmer debtors, this new device was promptly put to work to accomplish the same object as the old device which this Court wrecked.

It is consequently perfectly apparent that the mortgage holders expected the conciliation commissioner to sanction an unlawful act by fixing a fictitious valuation that would approximate the first mortgage claim. It is important to note that the respondent, **the first mortgage holder, could bid the amount of his $34,702 claim without paying a cent of cash. Any other bidder or the farmer debtor would have to pay the full sum in cash.**

This does not fix a market value; it does prevent redemption.

This illegal scheme would place a two-edged sword in the hands of mortgage holders. One edge would by a false valuation prevent redemption; the other would enforce a public sale at which, by bidding the mortgage claim, the farmer debtor and any other bidder would be cut off from bidding. Either edge is **calculated to cheat the law by depriving the farmer debtor of his right to redeem**, and to defeat this court's decision in *Wright* v. *Union Central*, 1940, 311 U. S. 273, making the farmer debtor's right to redeem superior to a request for a public sale. Thereby the "right" to redeem is turned wrong side out, by lip service to the law, and becomes no right at all.

The Statutory Standard of Value.

When the law by which valuation is to be measured is examined, we find:

Section 75(s) at the end of the first paragraph reads:

> "Such appraisers shall appraise all of the property of the debtor, wherever located, at its **then fair and reasonable market value.**"

That provision refers to the appraisal made at the beginning of the three-year stay under Section 75(s) which was set by the conciliation commissioner at $5800. R. 27.

At Section 75(s)(3), the law provides that:

> "Upon the request of any secured or unsecured creditor, or upon the request of the debtor, the court shall cause a **reappraisal** of the debtor's property, or in its discretion set a date for hearing, and after such hearing **fix the value of the property, in accordance with the evidence submitted.**"

That is, the debtor may redeem his farm at its "**fair and reasonable market value**" which has been fixed "in accordance with the **evidence submitted.**" It does not say, such value as the conciliation commissioner shall find, but "**in accordance with the evidence submitted.**"

A Resume of the Evidence Submitted at the Hearing.

There is a wide cleavage between two distinct types of evidence adduced at the hearing before the conciliation commissioner which may be grouped as follows:

The Mortgage Holders' Evidence.

First, there is the evidence of the mortgage holders based upon the theory that the valuation should be determined by the amount of the liens on the property. In putting in the amount of his first mortgage at $34,702 (R. 27) **the first mortgage holder** showed his adherence to this theory. By statute it was irrelevant; it had no place at all at the hearing. The **second mortgage holder, Cochran,** showed the same attitude and put his testimony enough higher to cover well his claim of more than $2,000. (R. 26). He valued the property up to $37,800. (R. 26). The testimony of **Chamberlain** (R. 10 to 11), an official in two banks, **who did not go on the farm,** fixed the value at $33,600. **Scanlon** (R. 11 to 12), who is not a farmer and had not lived on a farm for fifty years, fixed it at $33,674. **Osborn** (R. 12) **who did not go on the farm,** set it at from $31,920 to $33,600. **Huddilston** (R. 22 to 24), **who had not been on the farm for five years** and who says he sold 33 acres at $14,000 or over $400 per acre in Sagamore Hills (See map at debtor's Exhibit 1 at R. 28), a high class residence section of metropolitan Cleveland, went back to $29,400 after hearing the farmer debtor's witnesses at R. 12 to 22.

All showed the same basis of valuation—the amount of claims against the farm.

In several instances the mortgage holders asked questions like this: Do you know that such a farm was offered

for such a price (a high one)? This is not evidence. The mention of a supposed "offer" can only confuse unless it is backed up with evidence. Otherwise it is bluff. Evidence showing that an offer had been made to sell a farm for $300 an acre might be evidence that its value probably was no higher for otherwise the price should be higher. If actually offered and there were inquiries but no taker it would tend to prove that the price was too high—nothing more. To say to a witness "Do you know that the National Press Building was offered at a billion dollars?" is no evidence of its value.

Such was the evidence of value submitted by the respondent.

The Evidence of Other Witnesses.

Second, there is the evidence of the witnesses who had no other interest or motive than to arrive at the "fair and reasonable market value" of this farm.

Howard
R. 12 to 14

Howard had no interest in the case. He is City Planner of the Regional Association of Cleveland. He has made an extended study of that metropolitan district and has published several works on the subject. He shows that this farm lying midway between Cleveland and Akron (R. 28. See Macedonia which is encircled in red on the map) has no site value. In Cuyahoga County (Cleveland) alone there are already 40,000 acres of vacant un-subdivided land. There are 80,000 acres of farms like the Carter farm which could also be subdivided. There are now 28,000 vacant lots already subdivided which would house

500,000 people. There are also 160,000 tax delinquent lots in the county. (At the same ratio the already available home site land would provide for an additional population of about 3,000,000. He also testified that the proportion of all these figures for the vicinity of this farm is higher than for the County as a whole.

For the adjoining County of Summit the amount of farm land available for residence purposes is very much larger. The federal census shows Cuyahoga County, 1930, 1,201,455; 1940, 1,217,250 (an increase of about 16,000 in ten years). Summit County, 1930, 344,131; 1940, 339,405 (a decrease of about 4,000).

Adams
R. 14

Adams had no interest in the case. He has owned farms and been a farmer all his life and still owns over 400 acres. He has offered his farm at $40 to $50 an acre and has not been able to sell it although buyers have looked at it. He has been over the Carter farm and he valued it at $50 an acre or $8418.

Eagle
R. 15 to 16.

Eagle is not interested in the case. He is a farmer and also an appraiser of wide experience for the government and for federal land banks. He took samples of the soil as he does in his official appraisals. He went over every part of the farm and found some good soil. He found much light top soil with a very heavy subsoil that is very poor. Much of it is stony and underlaid with rock. He found about one-third of the peach trees frozen out and without value, leaving but two and two-thirds acres. The house roof is about gone—the shingles curling up. His valuation is $7795 or about $46 per acre.

Huber
R. 17 to 19

Huber had no interest in the case. He has been a farm real estate dealer for more than thirty years and has sold hundreds of farms, many in this community. He went over the farm. It has no scenic value whatever. Because it is situated between the two cities, although he had serious doubts, he added some to what he deemed the real value to be and named $12,040, or $71.66 per acre.

Plechaty
R. 21 to 22

Plechaty has been a farmer for fourteen years. He was a farm real estate dealer for many years in this part of the state. He looked for a farm in the vicinity for himself last year until he bought the Bowman farm nearby.

On the Bowman farm Huber had testified, (R. 19), that "It had about 98 acres and he sold it to Plechaty for $12,000. It had excellent buildings, the barn 'being one that nobody would want to build'. The house has three baths, vapor heat, and is in very good condition. It also had spring water running by gravity right into the barn and house, and in the orchard on out to the creek."

Plechaty has been on the Carter farm and knows it. He knows other farms nearby that are for sale. He values the Carter farm at $6500 to $8500, or about $39 to $50.00 per acre.

The Two Valuation Theories Compared.

There can be but one conclusion in considering these valuations running from $6500 to $12,400 by the disinterested witnesses, and from $29,464 to $37,883 for the mortgage holders. The disinterested witnesses were confronted with the difficult job of fixing the actual value of the farm

as it is now. They were not subject to any other consideration. The mortgage holders' witnesses were thinking of what **the valuation should be in relation to the mortgage claims.** They were concerned with a value that would freeze out the debtor from his right of redemption.

A bankruptcy court can not accede to such a scheme in a farmer debtor proceeding without stultifying the laws of the United States and the decisions of this court.

Was the Error Cured by the District Court's Review?

In the District Court's review the former $5800 appraisal which in the same proceeding had been made by three appraisers and approved by the conciliation commissioner without objection or appeal, was thrown out and disregarded. Statement of the conciliation commissioner: R. 26, bottom of page to top of R. 27. Statement of appraisers, R. 39 to 40. Docket entries: R. 4 to 8 passim. The Judge said: "that value, the Commissioner stated, was made for taxation purposes."

The answer is plain, it was not. The district judge not only failed to cure the error but he made it worse.

The Erroneous Statement that the $5800 Valuation Was for Taxation Purposes.

The judge did not say **when or where** the conciliation commissioner made the statement that the $5800 valuation "was made for taxation purposes." If made, it was made either off the record or in the record. If it was made off the record by the conciliation commissioner in a statement to the judge, verbal or written, it was a further extension in the same direction as the "personal investigation" made by the conciliation commissioner, a method of procedure roundly condemned. It was not

made in the record. The only reference in the record to the former $5800 valuation is contained in the words:

> "At this point at the request of counsel for the debtor, the conciliation commissioner stated that the former appraisement of Carter's farm in these proceedings was $5800." R. 26 to 27.

This categorical statement in the record was never questioned until the judge stated that the commissioner said the $5800 valuation "was made for taxation purposes." The history of that statement is here traced.

(1) The statement just quoted from the record at R. 26 to 27 is part of the narrative statement of the evidence as originally designated on appeal, which was addressed to the appellant, George A. Kubler, now the respondent here. R. 2, paragraph numbered 6. As there stated "One complete transcript of the evidence submitted at the hearing on said reappraisement has been filed with the clerk and one complete copy thereof has been delivered to counsel for said appellee." (George A. Kubler.) The filing of this designation and of this narrative statement is noted on the docket at R. 8 in two entries of January 9, 1942.

Rule 75(c) of the Rules of Civil Procedure provide that:

> "A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement, may require testimony in question and answer form to be substituted for all or part thereof."

This rule has been adopted by the Sixth Circuit to which the appeal was taken. Rule 10 (1) of the Sixth Circuit. No objection, or counter designation, was made by the appellee Kubler now the respondent here.

(2) In the reply brief of the same George A. Kubler, now respondent, filed in the District Court on the petition

for review, in answer to a reference in the petitioner's brief relating to the previous $5800 appraisal the present respondent Kubler accepted the narrative statement as correct. He there referred to it as "a formal estimate of the value of the farm, **made for the purpose of fixing a rental value**". "Taxation purposes" had not then been thought of.

(3) After the statement was made in the judge's opinion that the $5800 was for "taxation purposes" the respondent Kubler in his answer brief on appeal in the Sixth Circuit, for the **first time** represented that the $5800 appraisal was "for taxation purposes". He there said at page 12 of the appellee Kubler's brief in the Sixth Circuit:

> "At page 97 of the original transcript on file in this cause, Mr. McClain, attorney for the appellant, **asked the commissioner as to what the old appraisal referred to and the answers were, 'For tax purposes,' and 'I know I appraised it for taxation'.**"

BUT HE DID NOT QUOTE THE FULL TESTIMONY which shows that the words "For tax purposes" and "I know I appraised it for taxation" were **not uttered by the conciliation commissioner** but by Witness Cochran, the holder of the second mortgage. The following extract from the original transcript of the record at the hearing before the conciliation commissioner demonstrates conclusively that the conciliation commissioner said that the former appraisal in the farmer debtor proceeding was $5800 and that Witness Cochran testified that he knew nothing about the valuation in the farmer debtor proceeding but that he, Cochran, had appraised it for taxation.

Cross examination of Witness Cochran, pages 96 to 97 of the original transcript:

> "Q. You are second mortgagee here on this farm?
> A. Well, I think I am the second mortgagee.

Q. What is the amount of your claim?

A. I think it is something over two thousand.

Q. **And what was this land appraised at before this one hearing to the Conciliator some three years ago?**

Mr. Kimber: Well, I object. I don't know that Mr. Cochran would know.

Mr. McClain: I will ask the Conciliator to state what it was.

The Conciliator: Fifty-eight hundred dollars.

Q. Did you know what that was?

A. For tax purposes.

Q. You didn't know about the values in these proceedings?

A. You mean for taxation?

Q. **Do you know about the values in these proceedings?**

A. **Well, I don't remember about the valuation of the proceedings here.**

Q. **That is all?**

A. **I know I appraised it for taxation.**

Q. Now you spoke about a spring, Mr. Cochran, you know that that spring is at the northwest corner of the farm, that right?

A. Why no, the spring I spoke about is at the southwest corner of the farm. I know there is one at the northwest corner, but I don't think that is on this one hundred and sixty-eight acres now."

The only words spoken by the conciliation commissioner were these: "Fifty-eight hundred dollars" and they were in response to the question: "I will ask the Commissioner to state what it was" (that is, what was the former appraisal in this proceeding?) All reference to taxation was by the witness Cochran who said he had appraised the land. He denied knowing anything about the valuation in the farmer debtor proceeding, saying, "Well, I don't remember about the valuation of the proceedings here."

(4) Some time after April 5, 1943, the day when certiorari was granted, the respondent, George A. Kubler, filed in this court a "Supplemental Brief for Respondent". On page 9 of that Supplemental Brief the subject of the "Fifty-eight hundred dollars" is again mentioned. This time the positive statement previously made to the Court of Appeals is meticulously avoided. The conclusion is inescapable that, if any erroneous conclusion should be drawn from the quoted "record evidence" on page 9 of the Respondent's Supplemental Brief, the respondent, if it be suggested that he is responsible, can say "Thou canst not say I did it"!

When the petitioner applied to the district court to correct the erroneous assumption that the $5800 was for taxation purposes, showing by his own sworn statement and by the affidavits of two of the appraisers who made that appraisal that it was the official valuation made in the farmer debtor proceeding and that it was expressly approved by the conciliation commissioner as being the correct valuation, his application was denied. R. 38 to 41.

Thereby an additional error was committed in throwing aside and disregarding the former official appraisal in the same proceeding.

The "personal investigation" Issue.

On the petition for review the district court not only committed new error by misinterpreting the $5800 valua-

tion and throwing it overboard, refusing to consider it by the remark that the conciliation commissioner made the $5800 for "taxation purposes". It continued the error committed by the conciliation commissioner. It found no fault with the "personal investigation" by the conciliation commissioner although its employment was made the subject of four Specifications of Error in the petition for review and argued to the court. Specifications 5, 6, 7, and 8, found at R. 31.

It may be considered, in extenuation of the countenancing of the extra judicial "personal investigation" on the part of the conciliation commissioner by the district court, that the decision of the Ninth Circuit in *Mosier* v. *Mortgage Company*, 1941, 123 Fed. (2d) 423, reversing a conciliation commissioner and a district judge for its use, had not then been published.

The conciliation commissioner increased his own $5800 valuation four and one-third times to $25,200, based upon his "personal investigation". The district court, on review, threw out of consideration the $5800 valuation but increased it three and one-half times to $20,000. The question then becomes, suppose the conciliation commissioner had repudiated his $5800 valuation and, utterly disregarding it, made his "personal investigation" and found the valuation to be $20,000. The question answers itself. The extra judicial "personal investigation" destroyed all semblance of a judicial hearing. The appraisal upon such a foundation is repudiated whether it be $25,200 or $20,000. The law can not be bought off for $5200. No valuation growing out of a "personal investigation" is judicial. The conciliation commissioner is by mandate of the statute enjoined to fix the valuation **"in accordance with the evidence"** at a **"hearing"**. Instead of doing so

he strayed away from the hearing and constituted himself an **"appraiser"** in violation of the statute. Section 75 (s)(3).

Considered only "in accordance with the evidence submitted".

But let it be supposed that the "$5800" issue and the "personal investigation" issue be disregarded and the evidence itself alone be considered. "In accordance with the evidence submitted" a valuation of neither $25,200 nor $20,000 can reasonably be found. A brief review is sufficient. (1) The respondent's mortgage is $34,702. The second mortgage is $2000. (2) The respondent's evidence runs $33,600, $33,600, $31,290 to $33,600, $29,400, and (from the second mortgage holder) $37,800. (3) One witness is a mortgage holder. One is a bank official who did not go on the farm. One is not a farmer and has not lived on a farm for fifty years. Another did not go on the farm. One had not been on it for three years and another for five years. These were the mortgage holders' witnesses.

On the other hand we have five witnesses, all disinterested. One is a professional site value expert. All four of the others went over the farm recently. Three are farmers. One is a farm dealer operating extensively in the community. One was a farm dealer and now a farmer in the vicinity. One is a professional land bank appraiser and a farmer. Several gave detailed reasons. Their valuations run from $6500 to one of $12,040, which he considers is too high.

A reading of the statements of the ten witnesses discloses the paucity of reasons in the one group and the detailed reasons in the other. If mere computing machine

methods are to determine value, then the "booster of values" may go to the limit—the reasonable evaluator is limited to facts, but not the booster. He well knows that his flights of fancy will raise the calculating machine result. This is not "in accordance with the evidence submitted". The statute does not read: in accordance with the "figures" submitted. Where there is nothing in the case but the statement of the witnesses on hearing judicially conducted and reviewed, it could hardly be said that either $25,200 or $20,000 was in accordance with the evidence submitted.

Therefore the error committed by the conciliation commissioner was not cured, it was not even scotched by the district court's review. It was magnified.

The Appellate Court's "discretion" Theory.

After considerable contemplation of the order of the appellate court at R. 45, no answer has been found to the question, what does it mean? It reads, "there was no abuse of **judicial discretion** in the finding that the reasonable market value of the farm in question was $20,000", R. 45. Is the statement a confusion of the statute as a result of a transposition of the words "in its discretion" in Section 75(s)(3)? The statute reads: . . . "the court shall cause a reappraisal, . . . or **in its discretion,** set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted" . . . The only discretion delegated to the court is the right to choose one of two methods of determining the value, either by appraisers or by a hearing **in accordance with**

the evidence submitted at such hearing. Having proceeded to fix the value by a hearing, it must be determined solely by the weight of the evidence submitted at that hearing. The statute does not read that the conciliation commissioner shall "find" but that he shall fix the valuation "in accordance with the evidence submitted". The law is clear. There is no "discretion" to be exercised.

The "Supplemental Brief for Respondent."

Sixteen days after certiorari was granted in this case counsel for the petitioner received a copy of the "Supplemental Brief for Respondent George A. Kubler, on First Question Presented in Petition of Thad Benson Carter, as Petitioner."

Here that brief will be discussed briefly in the order of its paging.

Page 2 of "Supplemental Brief for Respondent"

The quotation from Section 75(s)(3) omits the words **"in accordance with the evidence submitted"**. The omission makes the statute as so partially quoted seem to countenance a mere "fixing of value" by the conciliation commissioner which is contrary to the statute.

On the same page the statement is made that when the "Judge . . . upon consideration of **all the evidence"** fixes the price, etc. The judge did not consider all the evidence. He threw out of consideration the $5800 valuation by the conciliation commissioner in the same case.

Page 6 of "Supplemental Brief for Respondent"

Whether the statement there made that the "one error question now under consideration was never raised or questioned in any of the proceedings before the district

court", refers to the "$5800" or to the "personal investigation" question, each was specifically raised in the district court. See specifications of errors numbers 5, 6, 7, and 8, at R. 31. Also see the sworn statement of the petitioner and the affidavits of two appraisers at R. 38 to 41.

Page 9 of "Supplemental Brief for Respondent"

The equivocal statement and extracts from the record presented at the above noted page has been fully exposed at pages ~~24 to 27~~ 29 and 30 of this brief.

Page 10 of "Supplemental Brief for Respondent"

There is no difference in principle between the *Moser* case and Mr. Carter's case. Precisely as in the *Moser* case the judge in Mr. Carter's case "without further evidence" acted on the conciliation commissioner's report. In fact the judge here not only took the conciliation commissioner's report without any further evidence but threw part of it out and disregarded it. The point of the *Moser* case, as in this, is that the report of the conciliation commissioner was wholly vitiated by a "personal investigation". A reduction in the finding of the conciliation commissioner by the district judge in the *Moser* case would not have made the illegal "personal investigation" legal. It was the unlawful procedure, not the amount of the valuation which made the conciliation commissioner's report in the *Moser* case void.

CONCLUSION.

The express provision of the statute that valuation shall be fixed in accordance with the evidence submitted at a hearing was violated. The redemption provisions of the statute have been violated.

Due process of law was violated by the personal inves-

tigation of the conciliation commissioner outside of the hearing conducted before him.

The decision of the district court, affirmed by the appellate court, is in conflict with well-considered decisions in other circuits under exactly the same as well as under similar statutes.

The theory that a bankruptcy court has a discretion in fixing the value of a farm for redemption under Section 75 is contrary to that statute.

The result of the decisions of the conciliation commissioner, of the district court, and of the appellate court, so far, is to defeat the purpose of Section 75 as interpreted in numerous decisions of this court.

The orders below should be reversed so that the farmer debtor may have a judicial determination of the valuation of his farm under the redemption provisions of the farmer debtor law.

Respectfully submitted,

Lima, Ohio
September 25, 1942

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